

PRIVY COUNCIL.

NANDI SINGH AND ANOTHER (PLAINTIFFS) v. SITA RAM AND ANOTHER
(DEPENDANTS).

P. C. *
1888
November
15th,
December 1st.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law—Gift—Inheritance in a village community in Oudh—Wajib-ul-arz modifying the Mitakshara law—Hindu widow's power of alienation—Operation of gift by her to two donees, one of whom could not take.

A clause in the wajib-ul-arz of a village in Oudh authorized any co-parcener not having male issue, or his widow, to make a gift of his share in the village to a daughter, or a daughter's son; the intention apparent from this, and from a further provision as to the descendants of a sharer's daughter, being to modify the law otherwise prevailing, *viz.*, the Mitakshara, and authorize the introduction of a daughter, or her son, and their descendants, male or female, in priority to brothers or nephews of the sharer.

Held, that such introduction was authorized, and that the inheritance, where the widow had made a gift of it in favour of a daughter, was transmitted to the daughter's daughter, the gift being of more than the donor would have taken as a widow.

The gift was to the daughter and to her husband jointly. *Held*, that the gift being invalid as to the husband, the daughter took the whole estate given on the general principle of gifts to two persons jointly, where they failed as to one of them, operating entirely for the benefit of the other who could take, declared in *Humphrey v. Tayleur* (1), which, not depending on any peculiarity of English law, was applicable here.

APPEAL from a decree (7th July 1885) of the Judicial Commissioner, affirming a decree (10th June 1884) of the District Judge of Lucknow, which varied a decree (24th December 1883) of the Subordinate Judge of the Unao District.

The suit out of which this appeal arose related to a gift of a one anna and three pies share in a village, named Baboo Rajnan, in the Unao District, of the description generally termed "Zemin-dari," or jointly held by the proprietary body (2). The share had

* *Present*: LORD FITZGERALD, LORD HOBBHOUSE, SIR R. COUCH and MR. STEPHEN WOLFE FLANAGAN.

(1) Ambler, 138.

(2) In these the co-parceners hold the whole village jointly in shares ordinarily determined by hereditary right, as distinguished from the ownership of shares in villages of another kind, shown by the area of the proprietor's possession.

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been owned by Sheo Baksh, who died in 1869 without issue, but leaving a widow Mussammat Bichan Kunwar, and a daughter Mussammat Mithan Kunwar. His nephews now claimed his share, and the principal question raised was, whether under the authority of the wajib-ul-arz of the village, and in consequence of a gift made by the widow to her daughter, that daughter's daughter took in priority to the collateral heirs of the deceased Sheo Baksh.

The clause in the wajib-ul-arz, and the contents of the deed of gift of 7th March 1870, by Bichan Kunwar to Mithan Kunwar and her husband Sita Ram (the latter not taking under it) are stated in their Lordships' judgment. Mithan Kunwar died in 1878, leaving her husband surviving her, and he was the first defendant in this suit, the other being his daughter by Mithan Kunwar, named Maharaj.

The Subordinate Judge held that the gift was invalid as to Sita Ram, but valid as a gift in favour of Mithan, to convey one-half to her; and that Mithan's estate descended to her daughter, Maharaj, under the terms of the wajib-ul-arz, which used the words, "*avind pisri*" "*ya dukhtari*."

On the plaintiff's appeal, the District Judge remanded the suit, directing that Maharaj, who had not till then been made a party, should be joined, and adding an issue as to the effect of the deed of gift of 7th March 1870 in favour of Mithan in transferring the entire inheritance. The Subordinate Judge repeated his former decree.

The District Judge's judgment was, that he found no specification of shares in the deed of gift, and though invalid as to Sita Ram, it passed the entire property to Mithan. In regard to possession which should have followed, he held that an application presented by Bichan Kunwar for mutation of names in favour of Mithan, alleging that she had given her possession, was sufficient evidence of possession given in Bichan Kunwar's lifetime. He therefore dismissed the suit with costs.

The Judicial Commissioner's judgment, after a short summary, was as follows :—

The main contention in appeal is, that the deed of gift of 1870, not having been followed by a transfer of possession during the donor's lifetime, is invalid according to Hindu Law.

The lower Courts however concur in finding that there was a transfer of possession during the life time of Mussammat Bichan Kunwar. The Court of First Instance has found that Mussammat Mithan Kunwar and her husband Sita Ram lived with Mussammat Bichan Kunwar, and that Sita Ram managed the estate on behalf of the family. Under these circumstances it is difficult, if not impossible, to ascertain the truth as to actual possession. It is however on the whole presumable that Mussammat Bichan did make over the estate to her daughter before her death. If the deed of gift were invalid by reason of Mussammat Mithan Kunwar's not having obtained possession during her mother's lifetime, and if she (Mussammat Mithan Kunwar) had no right of inheritance, the conduct of the plaintiffs appellants in acquiescing for nine years in her usurpation is inexplicable.

It is further contended that under the terms of the *wajib-ul-arz* the widow could not create any interest beyond her own lifetime. This no doubt is the ordinary Hindu Law, but it is clear that this is not the intent of the *wajib-ul-arz*, which I consider has been rightly interpreted by the Courts below, as giving the widow power to create an absolute estate in favour of the daughter, or daughter's son, of the original owner.

I further concur with the District Judge that the deed of gift, though invalid as regards Sita Ram, was a valid conveyance of the whole share in favour of his wife, Mussammat Mithan Kunwar, the daughter of Sheo Bakhsh. I therefore affirm the decree of the lower Appellate Court, and I dismiss the appeal with costs.

On this appeal, Mr. *J. D. Mayne* and Mr. *J. H. W. Arathoon*, for the appellants, regard being had to the finding of the Courts below in succession, as to the question of possession by Mithan, proceeded to other points in the case. It was argued that the judgments to the effect that under the *wajib-ul-arz* and the deed of gift, an absolute estate of inheritance descending to her own daughter was created in favour of Mithan, were wrong. How far the *wajib-ul-arz* had the effect of altering the law was open to question, it being merely part of the settlement record, and though entries were presumed to be true under ss 16 and 17 of the Oudh Land Revenue Act (XVII of 1876), it might be erroneous as in the case of *Uman Parshad v. Gandhiarp Sing* (1). At all events, the words must receive a reasonable construction, and one could be placed on it that did not conflict with the plaintiff's claims. It could hardly be that the widow could give an

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estate of inheritance which she did not herself possess. And that the words translated, "descendants," meant such descendants as were heirs, rather than that they should allow a daughter's daughter to come in as an heir, was the better construction. If moreover the *wajib-ul-arz* had authorized a certain exclusion of collaterals in favour of female heirs in a direct line, the gift of 1870 had not proceeded correctly upon the power given. The deed was invalid, at all events, as regarded one of the two donees, and formed but an ineffectual attempt to do more than create an estate for the life of Mithan Kunwar. If it could be taken to be intended to give a joint estate for the life of the daughter, or of both, with survivorship between them, it failed in both cases on the death of Mithan, and the right to inherit the share of Sheo Baksh belonged to his collateral heirs. The gift could not be treated as conferring upon Mithan an estate different from that which had been intended by the donor. Reference was made to *Harvey v. Stracey* (1), *Re Farncombe's Trusts* (2), *Re Brown's Trusts* (3).

The respondents did not appear.

Their Lordships' judgment was afterwards delivered, on 1st December, by

SIR R. COUCH.—The appellants in this case are the grandsons of one Fatteh Singh, who had two sons, Sardar Singh, the father of the appellants, and Sheo Baksh. The latter married Bichan Kunwar, and died on the 20th April 1869, without leaving any male child. They had a daughter Mithan Kunwar, who was married to Sita Ram, the first respondent. Mithan Kunwar died on the 18th March 1878, leaving a daughter Mussammat Maharaj, the second respondent. Bichan Kunwar died on the 26th March 1874. The suit was brought on 28th September 1883 by the appellants, to recover possession of land in the village, Baboo Rajnan, Pergunnah Harha, District Unao, which was the share of Sheo Baksh in the property inherited by him and his brother, the plaintiffs claiming to be his heirs according to Hindu law, and entitled to succeed to his estate on

(1) 1 Drew, 117.

(2) L. R., 3 Ch. Div., 652.

(3) L. R., 1 Exch., 74.

the death of his widow. It was not disputed that the plaintiffs would be entitled if the ordinary law was applicable. The defence was rested upon a custom of the village of Baboo Rajnan as to the right to inheritance, and a deed of gift, dated the 7th March 1870, executed by Bichan Kunwar.

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The wajib-ul-arz, which governs the right of succession to the property in dispute, is as follows:—

“Extract from wajib-ul-arz, of village Baboo Rajnan, Pergunnah Harha, paragraph 4, of right to inheritance.

“The rule of inheritance is that if a sharer has children by two lawfully married wives—that is, one child by one wife and several by the other—the children by both the wives shall get equal shares, that is, one child will get possession over one half, and several children over the other half. If one wife have children, and the other be childless, both of them will hold possession of equal shares for their lifetime; after the death of the childless wife, the children of the other wife will hold possession in equal shares. If there be no male child, and any sharer or his wife make a gift of his or her share during his or her lifetime to his or her daughter or daughter's son, and puts her or him in possession of the same, they will remain in possession. If there remain no descendants of any sharer's son or daughter, his brothers or nephews descended from the same ancestor shall take possession of the share. A non-married wife, or children by her, shall not get anything except maintenance.”

The intention appears to be to modify the Mitakshara law which prevails in Oudh by enabling a sharer in family property or his wife to alter the course of succession by introducing a daughter or daughter's son, and their descendants, male or female, in preference to brothers or nephews of the sharer. There is no reason for limiting the meaning of “descendants” to children, as where they are intended, that word is used, and where a male is intended it is so said. It is also apparent from the provision that the brothers and nephews are to take if there remain no descendants of a son or daughter, that the gift by the wife must be of more than the interest she would take as a widow, and is not, as the appellants contended, limited to that interest. Both the lower Courts have understood “descendants” as meaning male and female in any degree.

On the 7th March 1870, Bichan Kunwar executed a deed of gift of the property in dispute to Mussammatt Mithan and Sita Ram, the words of gift being followed by “I promise and agree

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"in writing that the donee may, from the date of execution of this instrument, take proprietary possession similar to mine over the gifted property. There has been left no claim right or dispute to me or any of my heirs." This was intended to be and should be construed as an absolute gift. The contention of the appellants in the lower Courts and before their Lordships was, that the gift being invalid as regards Sita Ram was also invalid as regards Mithan. The District Judge and the Judicial Commissioner have both held that it is a valid gift of the whole to Mussammat Mithan. Their Lordships are of this opinion: The gift is to the two donees jointly, and in *Humphrey v. Tayleur* (1), Lord Chancellor Hardwicke said: "If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable shall take the whole." This principle does not depend upon any peculiarity in English law, and is applicable to this deed of gift.

The question whether the gift was accompanied by possession was disposed of by their Lordships in the course of the argument, and it is not necessary to say more upon it.

Their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner, and to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Young, Jackson & Beard.*

C. B.

P. C.*
 1889
 February
 12, 13 and 16.

MAHABIR PERSHAD SINGH AND ANOTHER (PLAINTIFFS) v. MACNAGHTEN AND ANOTHER (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Res judicata—Code of Civil Procedure, s. 13—Omission to bring forward in a prior suit what then would have been a defence—Accounts between mortgagor and mortgagee—Purchase of mortgaged property by the latter at judicial sale, on leave obtained to bid.

A mortgage between parties who had accounts together, comprised lands which also were leased by the mortgagors to the mortgagees, who in 1878 obtained a decree upon the mortgage, although at the time they owed

* *Present*: LORD WATSON, LORD HOBHOUSE, AND SIR R. COUCH.

to the mortgagors a considerable sum for rents. The mortgagors did not then set up the defence that they were entitled to have a general account taken, and to have the mortgagees' decree limited to such balance as might be found to exist in favour of the latter. But the mortgagors alleged a specific agreement, which they failed to prove, that the rents were to be set off against the mortgage debt; and they also stated their intention to sue separately for the rents due. No deduction was made in the decree upon the mortgage on account of these rents, for which moreover afterwards the mortgagors did obtain a decree. But the mortgagees executed their decree upon the mortgage, notwithstanding objections (which were disallowed in 1882), and having obtained leave to bid at the judicial sale purchased the property. In the present suit, brought by the mortgagors to have the judicial sale set aside, and to have the mortgage debt extinguished, by having set off against it the rents which had already accrued, or might afterwards accrue, and for possession of the lands on the expiry of the lease:

Held, that, although an equity had been raised in favour of the mortgagors, that an account should have been taken and that the rents payable should have been credited against the sums due by them, yet this equity could not be enforced in this suit. The proper occasion for enforcing it would have been in defence of the suit upon the mortgage; the present claim was within the meaning of s. 13 of the Code of Civil Procedure; and the plaintiffs were now barred from insisting on it, *exceptione rei judicatæ*.

Nor could the mortgagees be held to have purchased as trustees for the mortgagors, as suggested for the appellant, the leave granted to bid having put an end to the disability of the mortgagees to purchase for themselves, putting them in the same position as any independent purchaser.

APPEAL from a decree (12th February 1886), affirming a decree (8th May 1884) of the District Judge of Tirhoot.

The suit, out of which this appeal arose, was brought by the proprietors of mouzas forming part of two taluks, Malik Alipur and Jonapur, in the Tirhoot District, which they had mortgaged to the defendants, who had caused the mortgaged villages to be judicially sold, themselves, by leave to bid granted by the Court executing their decree, becoming the purchasers. The question now raised was whether the mortgagors, notwithstanding the decree obtained against them, and the sales in execution, could now have an account taken of the mortgage debt, and have set-off in their favour, and against such debt, rents due to the mortgagors from the mortgagees; or whether, with reference to the law, as explained (Explanation II) under s. 13 of the Code of Civil Procedure, that any matter which might

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and ought to have been made ground of defence in a former suit should be deemed to have been a matter directly and substantially in issue in such suit, precluded the mortgagors from now insisting on their right to set off the rents.

The decree which the mortgagees had obtained, upon the mortgage in the Court of the Subordinate Judge, was dated 18th January 1878, and was affirmed by the High Court on appeal on 22nd May 1879.

The appellant, Mahabir Pershad Singh, and his brother Kumla Pershad Singh (the latter now deceased, and represented by the other appellant, a minor), leased to the proprietors of the Khanpur Indigo Factory, Messrs. E. Macnaghten and R. Olpherts, six bigas, part of their shares in the taluks above-mentioned. Their shares, however, in 1867, were sold at a sale for arrears of revenue. This sale was subsequently set aside by a decree of the High Court, affirmed by Her Majesty in Council, in *Bunwaree Lall Sahoo v. Mahabir Pershad Singh* (1).

The relations between the parties are set forth in their Lordships' judgment.

The mortgage on which the decree of 1878 was obtained was executed on the 9th December 1871.

On the 15th September 1873, while Bunwari Lal's appeal was still pending, Mahabir Pershad and his brother executed an ikrarnama, agreeing with Macnaghten and Olpherts to grant them further leases, and to give them other land in a mokarari, should the sale for arrears be set aside. Afterwards, on or about the 21st June 1874, pottahs and kabuliyats were executed between them.

On the 29th June 1877, Macnaghten and Olpherts sued Mahabir Pershad and his brother on the mortgage of 9th October 1871, to recover Rs. 34,516. In that suit the defence was, that an express arrangement had been made, whereby the mortgagees were precluded from recovering, without the taking of accounts between the parties; and an issue was raised whether there had been an agreement between the parties that the factory, taking the usufruct of the mortgaged villages, should liquidate in that way what might be due to it. The Subordinate Judge, in his

judgment of 18th January 1878, found that the arrangement alleged by the mortgagors had not been proved. He found that an adjustment of accounts between the parties had taken place on 31st December 1873, when the mortgagors were still indebted to the amount for which the mortgage was executed. The High Court affirmed this judgment on 22nd May 1879, observing that it had been proved that, on 31st December 1873, Rs. 25,000 were due on the mortgage, and that the alleged arrangement for rents to be set off had not been proved. The Judges also pointed out that the defendants, in their written statement, declared that the accounts and the sums due to them for rent were to be the subject of another suit, already filed. While that suit on the mortgage was pending, the mortgagors did in fact claim in another suit Rs. 4,475, rent due on a lease executed by Macnaghten and Olpherts on 21st June 1874. This claim was dismissed in the first Court, but on appeal, the High Court decreed the amount on 21st April 1881. Mahabir Pershad also obtained another decree on 30th June 1879 for Rs. 2,829, in a suit against the present respondents on other kabuliyats.

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Meanwhile, the mortgagees enforced the decree on the mortgage; and at judicial sales on 15th September and 20th November 1879, the mortgaged property was sold; and the decreeholders, having previously obtained leave to bid, became the auction purchasers for about Rs. 20,000.

Afterwards the mortgagor, Mahabir Pershad Singh, applied, under s. 311 of the Code of Civil Procedure, to have these two sales cancelled, alleging irregularity and inadequacy of price realized at the sales. This application having been rejected on 25th September 1880, the order rejecting it having been upheld by the High Court was maintained by an order of Her Majesty in Council on 24th November 1882 in *Olpherts v. Mahabir Pershad Singh* (1).

In the present suit, instituted on the 24th November 1883, the plaint asked, that the sales of 15th September and 20th November 1879 might be declared fraudulent and inoperative as against the plaintiffs, whose position as lessors was not, it

(1) L. R., 10 I. A., 25; I. L. R., 9 Calc., 656, nom. *Macnaghten v. Mahabir Pershad Singh*.

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was contended, changed; and that it should be declared that the plaintiffs were entitled to have rent from the defendants in respect of the leases and mokarari, from the time of satisfaction of their decree by setting off the sums due to the plaintiffs from the defendants; and that it should be declared that, after the expiry of the term of the leases, the plaintiffs were entitled to have khas possession; also for such other relief as might seem just.

The suit was dismissed by the District Judge, and on appeal, the following principal question was thus expressed, and disposed of, in the judgment of a Division Bench, composed of Mitter and Norris, JJ. :—

The only ground upon which this appeal has been argued is this, that as on the dates of sale mentioned above, a large amount of money was due from the defendants to the plaintiffs, and as the defendants were the mortgagees, the sale should be declared as null and void, and that an account should be taken between the plaintiffs and the defendants of the moneys due to each other; and if on taking such account anything be found due to the plaintiffs, they should be allowed to sell the mortgaged property for the realization of the same.

The plaintiffs allege, that the amount of money which was receivable by them from the defendants falls into two classes: *First*, the rents of the disputed property which the defendants had in their hands, having been collected by them for the plaintiffs, after possession was taken of the property in dispute in accordance with the decree of the High Court, dated 31st January 1871; *second*, the rents due under the ticca pottahs executed in June 1874.

Now, we find that in the suit which was brought by the defendants upon the bond dated 9th October 1871, the plaintiffs, who were the defendants in it, set up in their written statement that the plaintiffs in that suit were not entitled to recover the amounts sued for unless an account were taken of the two classes of money due to them referred to above. In that written statement they based their defence upon this point upon an express contract between the parties.

In the opinion of the Court of First Instance as well as of this Court, which heard the case in regular appeal, this express contract was not established.

As regards the first class, this Court found that on an adjustment of accounts between the parties, which took place on the 31st December 1873, the plaintiffs in this case were found still indebted, to the extent of the money for which the bond of the 9th October 1871 was executed. Therefore, as regards this amount, it is no longer open to the plaintiffs to contend

that anything was due to them from the defendants. The learned Advocate-General contended, that although the express contract upon which the plaintiffs relied in the former litigation was not established in the opinion of the Courts which dealt with it, yet the plaintiffs are not precluded from relying upon the equity which arises upon the establishment of the fact that on the dates of the respective sales, the defendants were indebted to the plaintiffs on account of the rents due upon the lease executed in June 1874. He further argued, that this equity was not pleaded and dealt with by the Court in the former litigation.

We desire to guard ourselves from being understood to say that, in our opinion, any such equity as is put forward by the learned Advocate-General on behalf of the plaintiffs, does really exist, having regard to the facts stated in the plaint. But conceding this point in favour of the plaintiffs, it seems to us that the result of the former litigation precludes them from relying upon it. The suit upon the bond dated 9th October 1871, was brought to recover the money due under it by the sale of the mortgaged premises. In that suit the equity in question, if it really existed, would have been a valid defence. Therefore the decree which was passed in favour of the plaintiffs directing the sale of the mortgaged premises, precludes the plaintiffs from setting it up again in a subsequent litigation.

We are, therefore, of opinion that the ground urged before us in support of the appeal is not valid. We may notice here a decision cited before us in support of this ground of appeal, *Kamini Dasi v. Ramlochan Sirkar* (1). In that case, what was sold by the mortgagee was not the mortgaged property but simply the mortgagor's equity of redemption. There is, therefore, this essential difference between the facts of that case and the present, that in the former the mortgagee bought in the equity of redemption, while in the latter, the mortgagee brought a suit to enforce his mortgage lien, obtained a decree declaring his right to sell the mortgaged property in satisfaction of that lien, and after obtaining sanction of the Court, himself became the purchaser of the property brought to sale in execution of that decree.

The result is that this appeal will be dismissed with costs.

On the plaintiffs' appeal, Mr. *R. V. Doyne*, for the appellants, argued that, as the facts showed that, at the time of the sales in 1879 in execution of the decree upon the mortgage, the respondents were indebted to the appellants in respect of rents, and money had and received; it followed that it was inequitable that the respondents should be allowed to bring the mortgaged lands to sale without coming to an account, and also inequitable that they should become the purchasers. It was also argued, that inasmuch

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as the decision already given on the mortgage had dealt only with an alleged right of set-off under an express agreement, the appellants were not precluded from establishing facts that might disclose a right of set-off. It was not now alleged that there had been any express agreement to that effect, but it was contended that an equity resulted from the relations between the parties to have an account. Moreover, the respondents having themselves become the purchasers at the judicial sales, should be held under the circumstances to have purchased as trustees for the appellants, notwithstanding that they had purchased after obtaining an order giving them leave to bid.

Reference was made to the Transfer of Property Act (IV of 1882), s. 99, and to ss. 13 and 111 of the Code of Civil Procedure. *Kamini Debi v. Ramlochan Sircar* (1), and *Neerunjun Mookerjee v. Oopendro Narain Deb* (2) were cited.

Mr. T. H. Cowie, Q.C., and Mr. C. W. Arathoon, for the respondents, were not called upon.

Their Lordships' judgment was delivered by

LORD WATSON.—In order to trace the circumstances which have given rise to the present litigation, it is necessary to go back to the year 1867; and it will be convenient, for the sake of brevity, to use the terms "Appellants" and "Respondents," as including not only the parties to this appeal but their predecessors in interest. The appellants, members of a joint Hindoo family, were owners of certain shares of 20 mouzas, in taluks Malik Alipur and Jonapur, which were sold, in that year, for arrears of Government revenue, to one Bunwari Lal. An action was brought by them to set aside the sale as irregular, which was dismissed in the District Court; but in January 1871 the High Court gave their decision in favour of the appellants, which was affirmed by this Board in December 1871.

The respondents held six of these mouzas in lease before the sale to Bunwari Lal. They were proprietors of an indigo factory in the neighbourhood, and they gave the appellants pecuniary and other assistance in their suit, in consideration of which the appellants, in April 1871, during the dependence

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of Bunwari Lal's appeal to the Privy Council, executed a mortgage bond, by which they hypothecated their interest in the 20 mouzas to the respondents for Rs. 25,000, with interest at 1 per cent. per mensem, payable in one lump sum by the month of April 1875. The appellants were restored to possession in April 1871, after the judgment of the High Court in their favour. In September 1873, the parties entered into an agreement by which, in consideration of further assistance already given, and to be given them by the respondents, the appellants undertook, in the event of Bunwari Lal's appeal proving unsuccessful, to renew the lease of the six mouzas, to let to the respondents the remaining 14 mouzas under a ticca pottah for 15 years, and to grant them a mokarari lease of $13\frac{1}{2}$ bigas, required by them for the extension of their factory. In February 1874, shortly after the dismissal of Bunwari Lal's appeal, the appellants executed a sunnud, authorizing the respondents to collect the rents of their mouzas for the year ending in September 1874, the respondents accounting to them, for their receipts, under deduction of costs and charges. In July 1874, the appellants, in terms of their previous agreement, renewed the lease of the six mouzas, at a rent of Rs. 645, for 15 years, from September 1874, and granted the respondents a ticca pottah, for the same period, of the remaining 14 mouzas, at a yearly rent of Rs. 3,527, subject to future adjustment. They also gave, as stipulated, a mokarari lease of the $13\frac{1}{2}$ bigas.

These transactions between the appellants and respondents, which were by no means complicated, have unfortunately been the occasion of numerous and protracted litigations. The respondents began the strife, in June 1877, by bringing a suit upon their mortgage bond. At that date, they undoubtedly owed to the appellants a considerable sum, for past rents of the 20 mouzas, no part of which had been paid. The appellants did not plead in defence to the suit that, in the circumstances already explained, they were entitled to have a general account taken, and the respondents' decree limited to the balance in their favour. They alleged that there had been a specific agreement (which they failed to prove) to the effect that the rents should be

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set-off against the mortgage debt; and they also stated that it was their intention to institute a separate action for recovery of these rents. The result was that, on their failure to establish the alleged agreement, the Subordinate Judge, in January 1878, gave the respondents a decree, without any deduction on account of rents, which was affirmed by the High Court on the 22nd May 1879. The respondents, in April 1878, sued for execution on the decree of the Subordinate Judge; but in consequence of its being appealed from to the High Court proceedings were stayed. The next step was taken by the appellants, who, in June 1878, raised two actions, one for the rents due in respect of the six and the other for the rents due in respect of the 14 mouzas. In the former of these actions they obtained a decree, and the latter was dismissed by the Subordinate Judge in April 1879, on the ground that the rent payable for the 14 mouzas had never been adjusted in terms of the lease; but the High Court, holding that it lay with the respondents to show what, if any, abatement ought to be made from the rent specified, on the 2nd April 1881 reversed his decision, and gave the appellants a decree for the amount of their claim, which was upwards of Rs. 15,000.

The judgment of the High Court in their mortgage suit having then become final, the respondents, in June 1879, revived the execution proceedings which they had instituted in April 1878. The mortgaged property was exposed for sale on the 15th September and 20th November 1879, when it was purchased in two lots by the respondents, who had obtained leave to bid from the Court, for Rs. 17,000. The regularity of the sale was impeached by the appellants, but their objections were over-ruled by the Subordinate Judge, and after being sustained in part by the High Court, were ultimately disallowed by this Board on the 24th December 1882.

Having thus failed to make good their statutory objections, the appellants, on the 24th November 1883, filed their plaint in the present suit, which prays to have the two judicial sales, of 15th September and 20th November 1879, set aside or treated as nullities; to have the mortgage debt extinguished by setting against it the rents which had already accrued or might afterwards accrue; and for khas possession of the mortgaged property

after the expiry of the respondents' leases in 1889. The prayer was based upon two grounds: The *first*, which attributed the sales to undue influence and oppressive conduct on the part of the respondents, was abandoned in the High Court, and was not insisted on here. The *second* consists in an alleged equity, arising out of the relations of the parties to each other in the years 1871 to 1874, and the transactions between them during that period, to have an account taken, and to have the rents payable by the respondents credited against the sums due by the appellants under the mortgage bond. Their Lordships are disposed to think that the circumstances upon which the appellants rely did raise such an equity in their favour. The mortgage bond, the agreement, followed by the granting of the leases therein stipulated, and the sunnud, were all parts of one complex transaction, the objects of which were to enable the appellants to recover their property from Binwari Lal, and to secure to the respondents re-payment of moneys which they had advanced, as well as remuneration for services rendered. But, assuming the existence of the equity, the real question in the present appeal is, whether it could be enforced by the appellants, in November 1883, to the effect of annulling the judicial sales of 1879:

Their Lordships entertain no doubt that the proper occasion for enforcing the equity, now pleaded, would have been in defence to the mortgage suit of 1877. That was certainly the suit in which any account to which the appellants were entitled, as in a question with their mortgagees, ought to have been taken. But the appellants not only abstained from putting forward any claim to a general accounting; they declared in their pleadings their intention of bringing a separate action for recovery of the rents, a proceeding which would have been wholly unnecessary if the plea which they urge in this appeal had been put forward and given effect to. The plea is within the meaning of s. 13 of the Civil Procedure Code of 1882, a matter which ought to have been made ground of defence in a former suit between the same parties, and the appellants are therefore barred from insisting on it, *exceptione rei judicatae*.

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It was argued by Mr. Doyne, upon the authority of a decision by Macpherson, J., *Kamini Debi v. Ramlochan Sirkar* (1), that the respondents must be held to have purchased as trustees for the appellants. The same argument, which is not raised in the pleadings, seems to have been addressed to the High Court, who, in their judgment, distinguish between that case and the present, on the ground that in the former, the mortgagee did not purchase the mortgaged property, but the mortgagor's equity of redemption. Their Lordships cannot regard that explanation as satisfactory. It appears to them to be probable that, in the case referred to, the mortgagee had not obtained leave from the Court to purchase. The report does not state that he had; and the reasoning of the learned Judge, and the mass of authorities by which he supports it, have a direct bearing upon the case of a mortgagee purchasing without leave, and in that view of the facts his reasoning is intelligible and logical. Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. If the decision of Macpherson, J., proceeded on the footing that the mortgagee had obtained leave, their Lordships are not prepared to assent to it. On that footing it appears to them that purchase of the equity of redemption by the mortgagee at a judicial sale would have the same effect against the mortgagor as the purchase of the mortgaged property.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The appellants must bear the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. T. L. Wilson & Co.

Solicitor for the respondents: Mr. S. G. Stevens.

C. B.

SRINATH DAS (PLAINTIFF) v. KHETTER MOHUN SINGH AND OTHERS
(DEFENDANTS).

P. O.*
1888
November
16th and 17th,
1889
February 5.

[On appeal from the High Court at Calcutta.]

Limitation Act 1877, Art. 135—Suit by mortgagee against mortgagor and purchasers from him—Regulation XVII of 1806—Transfer of Property Act (IV of 1882).

A mortgage by conditional sale, before the operation of the Transfer of Property Act, 1882, on default made in payment, proceedings having been taken by the mortgagee under Regulation XVII of 1806, entitled the mortgagee to possession after the year of grace. On the mortgagor's right of possession being thus brought to an end without a suit for foreclosure, a right of entry accrued to the mortgagee whose suit for possession, unless brought within twelve years from the date "when the mortgagor's right to possession determined," was barred by Art. 135 of Sched. II of Act XV of 1877.

This Regulation foreclosure was applied to a mortgage, dated 17th November 1865, between Hindus, with power of entry and sale, in the English form, of land in the 24-Pergunnahs District (which mortgage, therefore, received the same effect as a mortgage by conditional sale), and the proceedings were perfect, on or before 31st March 1873, as against the mortgagor, whose right of possession determined on the 17th February 1866. Parcels of the mortgaged land had been sold by the mortgagor, down to August 1866, and the purchasers, not having been served with notice of the above proceedings under the Regulation, were not parties thereto, so that the relation of mortgagee and mortgagor continued to subsist, as between them and the mortgagee, notwithstanding the determination of the mortgagor's right of possession.

In a suit brought in 1882 against these purchasers, as also against the mortgagor, for foreclosure and possession, by a transferee who had acquired the mortgagee's interest in 1879: *Held*, that the mortgagor's right of possession determined on the above date, and that the mortgagee's right of suing for possession having been extinguished on the expiration of twelve years from that time, *viz.*, on the 17th February 1878, such right was not revived by the subsequent creation of suits for foreclosure, on the coming into operation of the Transfer of Property Act, 1882; and that the title of the plaintiff, made through the mortgagee, to sue the purchasers for possession of the mortgaged land, was barred by time under Art. 135, as against them.

The suit therefore was dismissed as against the purchasers; but as against the mortgagor, who made no defence, the right of possession in the mortgagee consequent on the proceedings under the Regulation in force till its repeal in 1882 supported the decree made against him by the Courts below, from which he had not appealed.

* *Present*: LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH and MR. STEPHEN WOLFE FLANAGAN.

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APPEAL from a decree [18th November 1885 (1)] of the High Court, reversing a decree [17th June 1883] of the Second Subordinate Judge of the 24-Pergunnahs District.

This suit was brought by the appellant, the transferee of a mortgagee, against the mortgagor and twenty-eight other defendants, the latter holding distinct plots of the mortgaged property under purchases from the mortgagor. And the question was whether the suit as against these purchasers, now respondents, was barred, as being a suit brought for possession more than twelve years after the mortgagor's right to possession determined, under Art. 135 of Sched. ii of Act XV of 1877; or fell within Art. 147, allowing sixty years from the time when the mortgage money became due for the mortgagee's suit.

The plaint was filed on the 6th September 1882, after the Code of Civil Procedure of that year, and the Transfer of Property Act, 1882, had come into force; s. 2 of the latter Act repealing Regulations I of 1798 and XVII of 1806, relating to mortgages, their foreclosure and redemption, and the Act substituting its own provisions.

The mortgage deed, which was in the English form, was executed, on the 17th November 1865, by Huri Narain Dey to Shama Sundari Debi, of five holdings of land in the 24-Pergunnahs District, to secure Rs. 15,705, to be repaid with interest at 18 per cent. on 17th February 1866. Besides the usual powers to the mortgagee to enter upon default and to sell, there was a provision enabling Huri Narain Dey "to sell such portions of the mortgaged premises as he might be able to sell to such purchasers, and at such prices as he shall deem advantageous," with an agreement for "the release of the piece or pieces of land so sold from this mortgage." The deed was registered on the 23rd January 1866. Sales of portions of the mortgaged property then took place.

Shama Sundari, as mortgagee, on the 15th February 1872, petitioned the District Court, under Regulation XVII of 1806, ss. 7 and 8, to issue a notice of foreclosure to Huri Narain Dey, alleging that there was then due the sum of Rs. 28,777 on the mortgage. On the same day, the order was made "that the usual notice of one year, together with the copy of the petition,

be served on the opposite party." No notice of these proceedings was served on any of the defendants in this suit, other than Huri Narain Dey, although they, with the exception of No. 29, purchased before the proceedings were taken. On the 31st March 1873, the Judge ordered as follows: "Whereas one year has elapsed from the date of the service of notice, ordered that this be struck off the file." And no further step was taken by the mortgagee to obtain possession of the mortgaged land, or to enforce any rights against the purchasers. But Shama Sundari, on 10th May 1879, by a conveyance in the English form, duly registered, sold and assigned to this appellant, for Rs. 11,000, all her interest in the mortgage debt and interest due from Huri Narain Dey, and in the mortgaged lands, confirming this by a subsequent deed of 1st April 1880. The prayer of the plaint was that the defendant be ordered to pay, within a time to be specified by the Court, Rs. 63,212, or the sum that might be found due on the taking of accounts and interest for the period of the suit; also a declaration was asked that in default of such payment, the defendants were not entitled to redeem, and that the plaintiff should have possession.

Huri Narain Dey and eight of the twenty-nine defendants made no defence. The others alleged title, each to their several portion of the mortgaged land, under kobalas from the mortgagor; some of them admitting notice of the mortgage, and alleging payment of the purchase-money on account of the mortgagee, Shama Sundari, others denying all knowledge of the mortgage. Some alleged title through mesue or intermediate transfers, others claimed directly through Huri Narain Dey. The latest purchase had taken place in August 1866. All those who defended relied on limitation, alleging that the mortgagor's right to possession having determined on the 17th February 1866, and twelve years from that date having expired in 1878, the suit was barred in the latter year.

On the issue of limitation, as also in other respects, the judgment of the Subordinate Judge was in favour of the plaintiff, to whom he decreed possession. He held Art. 147 to be applicable, and not Art. 135 of Act XV of 1877.

From this decree sixteen of the defendants appealed to the High Court, which reversed it as to all the defendants except the first,

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the mortgagor. The judgment of a Divisional Bench [PIGOT and O'KINEALY, JJ.] (1) was that as against all the defendants except the first, the plaintiff's suit should have been dismissed, as he had failed to prove his title as against them, and had also failed to prove the identity of the parcels occupied by them with those that he claimed. The only ground however of dismissal that need be stated is limitation, as to which the judgment of the High Court will be found reported in I. L. R., 12 Calc., 616.

On this appeal, which included all the defendants as respondents,

Mr. R. V. Doyne and Mr. J. D. Mayne, for the appellant, argued that the period of limitation was given by Art. 147 of Sched. ii of Act XV of 1877, and not by Art. 135, the latter having been wrongly applied by the High Court, which had failed to see the distinction between a claim to possession by the mortgagee, as against the mortgagor, made in the character of mortgagee, and a claim for an account for foreclosure and sale brought by the mortgagee, or as here by his transferee. A mortgagee, after taking proceedings under Regulation XVII of 1806, if entitled by the terms of his mortgage to possession, still had to sue for it, if out of possession, or for a declaration that he was entitled to it, if he was in possession, there being no decree upon proceedings under the Regulation—See the judgment in *Forbes v. Ameeroonissa Begum* (2). And it followed that such a suit brought by the mortgagee must be brought within twelve years from the date when the mortgagor's right of possession determined, that being the case to which Art. 135 was applicable. But when a suit, as in this instance, aimed at bringing the mortgage to an end, Art. 147 was applicable.

The frame and prayer of the present suit were justified by, and maintainable under, the Transfer of Property Act, 1882, which repealed Regulation XVII of 1806. They were also in accordance with s. 16, cl. c, of the Code of Civil Procedure (Act XIV of 1882). The Transfer of Property Act came into force on the 1st July 1882, establishing for mortgagees the suit for

(1) *Shurnomoyee Dasi v. Sreenath Dass*, I. L. R., 12 Calc., 616

(2) 10 Moore's I. A., 340.

foreclosure; so that the appellant obtained thereunder the right to maintain this suit for foreclosure. It was under this Act that his rights were enforceable against the purchasers, who were no parties to the previous proceedings against the mortgagor. There was nothing in the state of things existing between 1878 and 1882 which excluded the appellant from obtaining the benefit of the law which in the latter year he found in his favour. Referring to the development of the law of mortgage in Bengal, originally land mortgaged by way of conditional sale became the lender's property on non-payment of the money lent; but Regulation XVII of 1806 controlled the mortgagee's right until he should have taken proceedings as the Regulation directed to terminate relations according to his contract. The mortgage in the English form of land, outside the local jurisdiction of the Supreme Court and of the High Court which had succeeded it, was dealt with by the Courts in the same way. And these proceedings being ministerial, and not judicial, and the so-called foreclosure not resulting in any decree, the mortgagee had, nevertheless, in any case, to sue for possession—See the judgment in *Forbes v. Ameeroonissa* (1) at page 350 of the report. The provisions of the three successive Limitation Acts were then referred to, the conclusion being drawn that Art. 135 applied where the relation of mortgagor and mortgagee subsisted, and did not apply where the suit was to change the character of the relation of mortgage to that of absolute ownership.

Reference was made to *Bhowani Charn Mitre v. Joykishen Mitre* (2), *Forbes v. Ameeroonissa Begum* (1), *Brojonath Coondoo Chowdhry v. Khelat Chunder Ghose* (3), *Huro Chunder Goocho v. Gudadhur Koondoo* (4), *Sarasibala Debi v. Nand Lal Sen* (5), *Denonath Gangooly v. Nursing Prosad Dass* (6), *Ghina Ram Dobey v. Monaruth Ram Dobey* (7), *Burmamoye Dasi v.*

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(1) 10 Moore's I. A., 340.

(2) S. D. A., 1848, p. 354.

(3) 6 W. R., 269; and, on appeal, 14 Moore's I. A., 144, and 8 B. L. R., 104.

(4) 6 W. R., 184.

(5) 5 B. L. R., 389.

(6) 14 B. L. R., 87.

(7) 7 C. L. R., 580; I. L. R., 6 Calc., 566 (note).

1889	<i>Dinobundhoo Ghose (1), Gokuldass v. Kripa Ram (2), Mankee Kooer v. Munnoo (3).</i>
SRINATH DAS v. KHETTER MOHUN SINGH.	None of the respondents appeared. On a subsequent day, 5th February 1889, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The appellant, who was the plaintiff below, is the transferee of a mortgage effected by the first defendant Huri Narain Dey in favour of Shama Sundari Debi. The mortgage bears date the 17th November 1865. It is in the English form, providing for the payment of the debt on the 17th of February 1866, and giving to the mortgagor the right of possession until default in payment, and to the mortgagee the right of entry after default. The property mortgaged is in the district of the 24-Pergunnahs.

On the 15th February 1872, Shama Sundari applied to the District Judge of the 24-Pergunnahs to issue as usual a notice of foreclosure to the opposite party, under Regulation XVII of 1806. The opposite party was Huri Narain. The notice was served on him, and, on the 31st March 1873, a year having elapsed from the date of the service, the case was struck off the file. It is clear, therefore, that Huri Narain's right to redeem was foreclosed, and that as against him Shama Sundari became absolute owner, on or shortly before the 31st March 1873.

In the year 1879 the plaintiff acquired Shama Sundari's interest in the mortgaged property, and on the 6th September 1882, he brought a suit against Huri Narain and twenty-eight other defendants whom he alleged to have been holding possession of several plots of the property, claiming by purchase and otherwise from Huri Narain. He stated that they ought to have been made parties to the foreclosure case, but Shama Sundari had not done that; that the defendants knew of the mortgage; that nothing had been paid on account of the mortgage debt; and that the defendants refused to pay. He prayed an order for payment, and, in default, a declaration that

(1) I. L. R., 6 Cal., 564; 7 C. L. R., 583.

(2) 13 B. L. R., 205.

(3) 14 B. L. R., 315.

the defendants would be unable to redeem the mortgaged properties, and an order for possession.

Huri Narain has not made any defence at any stage of the suit. Of the other defendants, some either did not appear or did not put in any statement; one pleaded a mistake of personal identity, and eighteen, besides other pleas, contended that the suit was barred by time. Seventeen of them stated that they held plots purchased of Huri Narain at various dates, ranging from November 1865 to August 1866. Some of them stated as to their own plots, that Shama Sundari was privy to the purchases, and that the price was paid to her agent in reduction of the mortgage debt. But as the latest of these alleged transactions was in August 1866, the difference between the cases of these defendants need not be considered. One defendant, No. 29, stated that he had purchased two plots of Huri Narain's land, one in February 1873 at a revenue sale, the other in December 1876 at an execution sale. This defendant stands in a different position from the others as regards both time and the effect of the foreclosure proceedings. But if his title is impeachable at all, which their Lordships are far from suggesting, it must be in a suit properly framed and conducted for that purpose.

With this exception of No. 29, for whose case no issue was framed, their Lordships do not intend to discuss any other plea than that of limitation. Whether the plaintiff really acquired Shama Sundari's interest; whether the defendants' plots are or are not included in the mortgage; whether Shama Sundari was privy to the sale by Huri Narain; whether the purchase-money was paid on account of the mortgage; whether the purchasers knew of the mortgage; whether their possession was adverse or non-adverse; all these questions have been discussed, but are immaterial, some in any case, and the others if the suit is barred by time.

The ruling Act is No. XV of 1877, and the question is whether the case falls within Art. 135 or 147. Article 135 provides that a suit by a mortgagee for possession of immoveable property mortgaged, shall be dismissed if instituted after twelve years from the time when the mortgagor's right to possession determines.

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Article 147 provides that a suit by a mortgagee for foreclosure or sale shall be dismissed, if instituted after 60 years from the time when the money secured by the mortgage becomes due.

The Subordinate Judge made a decree against all the defendants without distinction, for payment, and on default for foreclosure. As regards the question of limitation, his grounds were as follows: that if the foreclosure proceedings were regular, a new starting-point of time was gained in February or March 1873; but if they were irregular, the mortgagee possessed only an inchoate right of possession, and so the mortgagor's right had not determined; that suits for foreclosure were, under the Codes of 1859 and 1877, allowed in the Bengal Mofussil; and that the plaintiff had a right to bring this suit quite independently of the Transfer of Property Act of 1882. These reasons lead up to the conclusion that the case falls within Art. 147, which allows 60 years to sue.

From this decree, sixteen of the defendants appealed to the High Court. The Court was of opinion that the mortgagor's right to possession determined on the 17th of February 1866; that the mortgagee's right to bring a suit for possession was barred on the 17th February 1878; that, with the right to possession, was lost the right to take foreclosure proceedings under the Regulation of 1806; and that suits for foreclosure were then unknown in the Bengal Mofussil. They therefore concluded that the suit was barred by force of Art. 135, and they dismissed it against all the defendants except Huri Narain. They do not assign their reason for not dismissing it against Huri Narain, but their Lordships presume the reason to be that as against him they took the suit to be one for possession, founded on the title acquired in February or March 1873 under the Regulation. From that decree the plaintiff appeals.

All the defendants, except Huri Narain and another, are made parties respondent to the appeal. No one has appeared, and their Lordships have not had the advantage of hearing argument in support of the decree; but after taking time to consider, their Lordships find themselves in agreement with the High Court.

The inferences of fact which the Court is bound to draw from the evidence or the omission of evidence in the case appear to

their Lordships to be as follows: the foreclosure was, as against Huri Narain, perfect on or before the 31st March 1873; the purchasers from him were not served with notice as required by the Regulation; they therefore remained unaffected by the proceedings, and the relationship of mortgagee and person entitled to redeem continued to subsist between Shama Sundari and them; the purchasers have continued in undisturbed possession since the time of their respective purchases; no interest has ever been paid on account of the mortgage debt; if any part of the principal has been paid in respect of any of the plots, the latest payment was made in August 1866; therefore, if Art. 135 is the one applicable to the case, the twelve years there allowed ran out in the month of August 1878 at the latest.

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In order to succeed then the plaintiff must show that Art. 135 is wholly inapplicable to his case. To do that, it is contended that Art. 135 applies only to those cases in which a mortgagee desires to take possession in that character; that if he wishes to foreclose he may do so within the time limited by Art. 147; that on the 1st July 1882, the right to maintain foreclosure suits was conferred on Bengal mortgagees; and that the Limitation Act immediately fastened on those suits, and provided 60 years as the limit for them.

To this argument it is sufficient for the present case to answer that in the year 1878, when no suit for foreclosure could be brought, the right of Shama Sundari to possession was wholly extinguished, and the title of the purchasers under Huri Narain freed from the mortgage. The subsequent creation of suits for foreclosure could not, except by clear enactment, revive the extinct right, and in effect the clear enactment is the other way, for s. 2, cl. (c), of the Transfer Act says that nothing therein shall affect "any right or liability arising out of legal relation constituted before this Act comes into force, or any relief in respect of such right or liability." Their Lordships consider that, within the meaning of this section, the rights of the purchasers to unencumbered ownership of their plots have arisen out of the legal relations between them and Huri Narain and Shama Sundari.

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It is therefore unnecessary to discuss what has been so much urged at the bar, *viz.*, the effect to be attributed to Art. 147, a provision which appeared for the first time in the Act of 1877.

The result is that the High Court decree is right, and should be affirmed, and the appeal dismissed. Their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellant: Messrs. T. L. Wilson & Co.

C. B.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Trevelyan.

MACKENZIE LYALL & CO. v. CHAMROO SINGH & CO.

1889
June 15.

Sale by auction—Auctioneers—Agent bidding “kutchu-pucca”—Usage of trade—Custom—Condition of sale.

An agent of the defendants made, at an auction sale, a bid for certain goods: this bid was not at the time accepted by the auctioneers, but was referred to the owners of the goods for approval and sanction, the agent agreeing to such reference. The conditions of sale contained no clause stipulating for such procedure.

Previous to any reply being received by the auctioneers from their principals, the principals of the agent bidding refused to acknowledge the bid of their agent.

In a suit brought by the auctioneers to recover a loss on a re-sale of the goods, the plaintiffs set up a usage of trade, whereby it was alleged that the bidder at such a sale was not at liberty to withdraw his bid until a reasonable time had been allowed for the auctioneers to refer the bid to the owner of the goods. The only evidence on this point was that of an assistant to the firm of the plaintiffs, who stated “that such an arrangement had never been repudiated.” *Held*, that the conditions of sale containing no clause to the effect of the usage claimed, and there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law, there was no contract between the parties, and therefore that no suit would lie.

ON the 5th November 1888, Messrs. Mackenzie, Lyall and Co., auctioneers, put up for sale, under their usual conditions of sale, certain cases of zanella cloth.

* Small Cause Court Reference No. 3 of 1889, made by G. C. Sconce, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 9th of April 1889.

For lots 287 and 288, two cases of zanella cloth, one Kartick Singh, an agent of the defendants, made a bid of seven annas per yard; for lots 289 and 290 of the same cloth, he made a bid of six annas per yard.

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At the time of making the above bids, Kartick Singh was informed by the auctioneers, who did not actually knock down the goods to him, that his bids were accepted "*kutchu-pucca*" and that he would be informed later on, if his offer was accepted, and to this he replied: "All right, when it is made *pucca*, inform us." At the trial a "*kutchu-pucca*" bid was explained as being equivalent to a "firm offer," and it was stated that, by the custom of trade, a man who makes a "firm offer" is bound not to withdraw it at least till a reasonable time, say two or three days, has elapsed for its acceptance, the auctioneers meanwhile undertaking to submit the offer to their principals. The only evidence, however, given on this point was that given by an assistant in the plaintiffs' firm who stated that such an arrangement had never been repudiated.

On 6th November, Messrs. Mackenzie, Lyall & Co. received a letter from the defendants, the principals of Kartick Singh, repudiating the contracts on the ground that Kartick Singh had no authority to bid for the goods on their behalf. On the 7th November, the plaintiffs having heard from their principals, wrote to the defendants, informing them that their offer had been accepted. The defendants however refused to take delivery of any of the goods, although requested so to do. The goods were therefore put up again for sale on the defendants' account, the price fetched at such re-sale showing a loss of Rs. 1,003-8-6, and after a request for payment of this amount, Messrs. Mackenzie, Lyall and Co. sued Chumroo Singh and Co. in the Court of Small Causes for the balance due. The conditions of sale made no reference to "*kutchu-pucca*" bids, nor contained any clause stipulating for the procedure relied on.

The learned Chief Judge found that the custom relied on by the defendants, if it existed, was unreasonable; and on the question of the repudiation of the contracts by the defendants, he found that Kartick Singh was the defendants' agent, having authority to bid at the sales; that the repudiation or withdrawal by the defendants of the bid made by them, being prior in point of

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time to the acceptance of such bid by the plaintiffs, the defendants were not liable. He therefore dismissed the suit, but at the request of the pleader for the plaintiffs made his judgment contingent on the opinion of the High Court as to whether or not the defendants were liable, notwithstanding their repudiation of the bid before acceptance of the bid by the plaintiffs was communicated to them.

On the hearing of the reference,

Mr. *Acworth* for the plaintiffs referred to Pollock on Contracts (4th Edition), p. 24.

Mr. *Bonnerjee* and Mr. *Garth* for the defendants were not called upon.

The opinion of the Court (PETHERAM, C.J., and TREVELYAN, J.) was delivered by

PETHERAM, C.J.—The question in this case is, whether there was any contract between the parties.

The plaintiffs in this case are auctioneers carrying on business in this city, and the defendants are merchants, and on some day the plaintiffs published an advertisement of the goods they had to sell, and they also published the conditions of sale. On the occasion of this sale, an agent of the defendants attended the sale and bid for certain lots, and the auctioneer who held the sale did not knock down the lots, but intimated to the bidder that his bid was accepted *kutchu-pucca*.

Now, the first thing that occurs to one to do is to look at the conditions of sale to ascertain whether there are any conditions which deal with an intimation of this kind, and we find that there are not. The plaintiffs say that, by the custom of the sale room, an intimation of this kind is an intimation that the goods were put up by them for sale, subject to a reference to the owners of the goods if, I suppose, the bids are below a certain amount. What they undertake to do is, they undertake to submit the bid to the owners within a certain time, but until it has been so submitted there can be no acceptance of the bid. In this case, the defendants withdrew the bids, or repudiated the bids, or at all events they wrote to the auctioneers intimating that they did not intend to purchase the goods. In an

ordinary sense, it is clear that a bid made at auction can be retracted before it has been accepted, the reason being that until the goods are knocked down there is no contract with any one. He who makes the offer may withdraw unless he is under a contract not to do it, because until it is accepted there is no contract between the parties. The defendants having withdrawn the bids before they were accepted, it is clear there was no contract of sale. Mr. Acworth admits that what took place could not amount to a contract of sale, but he contends that there is, by the custom of these sale rooms, an implied agreement, or an agreement by the bidder that, in consideration of the agreement by the auctioneers to submit the offer to their principals, the bidder promises not to retract his bid until it has been either accepted or refused. It may be that that very often takes place. There is no evidence to show that there was such a contract in this case. Indeed the evidence is the other way, because if it were part of each contract, you would expect to find it mentioned in the conditions of sale, but the auctioneers do not place anything of the kind in the conditions of sale. Then, is there any evidence that there was so universal a custom as to become part of the contract by operation of law? There is no evidence of that kind. The only evidence given on the subject is the evidence of one of the assistants in the sale room, that such an arrangement had never been repudiated. That in my opinion is absolutely insufficient to establish a custom of this kind, and I think, therefore, that, under these circumstances, there was no contract, and there being no contract there could be no breach and no cause of action, and the learned judge of the Small Cause Court was right in dismissing the suit so far as the goods were concerned.

I think it right to add that if any persons in the position of auctioneers wish to incorporate any such special arrangements as this in their contracts, it ought at least to be made a portion of the conditions on which they sell.

In the result, the questions referred to us will be answered in the negative.